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Morality clauses and decision making in situations of scientific uncertainty: the case of GMOs

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1. Introduction

When there is no consensus over the risks of a product or activity, this is likely to translate into a trade dispute, as one country restricts entry or production of what another country sees as the legitimate object of trade. Who is right may be the wrong question to ask, seeking as it does more objectivity than the science may be able to provide. However, the framework of international law does need to be able to decide whether the restrictions imposed are legitimate or not. This largely reduces to the question of whether the restrictions fall within an explicit or implicit exception to the general and binding principles of free trade between states.

The grounds offered for such an exception are usually of one of two forms, based on democracy or science. The first suggests that since the scientific position is unclear, trading systems need to respect the views of the populations of states. It is wrong to impose a product on a people who regard it as unsafe or undesirable, and the law does, or should, reflect this. The second argument says that while dangers cannot be proved, they cannot be excluded either. It offers a particular interpretation of a lack of scientific proof, and is usually phrased in the language of science. It seeks to present a precautionary approach as a correct and objective response to the scientific evidence.

This paper suggests that neither argument is satisfactory. Democracy arguments are incompatible with binding agreements, while arguments from science, when the science is not conclusive, become fatuous. Really, when states disagree about matters such as this they are not disagreeing about what they know, but about the proper reaction to not knowing. Different opinions on this are rooted in different perceptions of when and why it is justified to take risks, and who should be allowed to do so, which is rooted in turn in perceptions about the relationships and obligations that different persons and institutions have to each other. The best description of these kinds of disagreement is in terms of morality, and so the best

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form of legal exceptions to rely on are public morals clauses. These arguments are made in the context of the recent WTO Panel Report on GMOs, the earlier US Gambling case, and the wording of the GATT, TBT, and SBS agreements.

2. The GMO story

The dispute between the United States, Canada, and Argentina on one side, and the European Communities and some of their Member States, on the other, over the refusal of the latter parties to admit products that had been genetically modified, is multi-faceted and complex.¹ It raises issues of procedure, evidence, and substance. However, underlying it is a substantive difference of opinion about GMOs, which at times produced rhetoric suggesting the parties were poles apart.

In fact, two premises were reluctantly shared by both parties. One is that bad things might happen as a result of genetic modification. It is not impossible, for example, that long-term consumption of (some of) these might have health effects, or that genes might jump to other species, with harmful effects, or that GMOs might come to drive out non-modified variations of the same plant. Such things are not in principle incompatible with existing scientific theories, and therefore cannot be excluded. On the other hand, it is also true that in general, and in the cases under consideration, these things have not happened, even though some of the products have been around for quite a while.²

Part of the case was an argument about what the two facts above tell us about the probability of bad things happening. It will be argued below they tell us nothing very useful. This superficially scientific part of the case was facile and relatively unimportant.

The important disagreement was about attitude. Here the Europeans emphasized, in the light of the first premise, the need to be precautionary, while the Americans emphasized, using the second, the need not to block progress. It is argued below that the value choices underlying this difference are where the substance of the case lies.

3. Democracy and GMOs

It is discomfoting that the relatively undemocratic and commerce-oriented rules of world trade can force a population to admit products that they genuinely do not wish to have on their market. Whether or not the views of the majority are rational, contemporary deference to democracy suggests that they should be able to decide for themselves what is made and sold within their jurisdiction.³

¹ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, DS 291, DS 292, DS 293.

² See the Panel Report, referring to the arguments of the parties, for extensive discussion of this. See also Chalmers (2005).

³ See Howse (2000: esp. p. 2337).

Therefore, it might be thought, the WTO should concede to national popular preferences on points like this.

Such a view will not work. It is the point of agreements that parties are bound. If an agreement contains a clause allowing one party to derogate when the majority of its population genuinely wishes to, then it barely deserves to be discussed in terms of law, or not even called an agreement at all. It is, insofar as governments are the representatives of the majority, an at-will arrangement. Such an arrangement would have limited stability or use.⁴ It would further provide a motivation for protectionist politicians to stir up the public.⁵ Majoritarian popular opinion alone cannot justify derogations from WTO law.⁶

4. 'Scientific' arguments about scientific uncertainty

If a generation or two have eaten GMOs without any identifiable consequences, then it seems reasonable to say that GMOs do not harm health. After all, the time span for health consequences is limited, since people do not live forever. However, some GMO risks involve a single event which is the beginning of a harmful cascade – for example the risk of a gene crossing species, and then having a harmful effect on its new host.⁷ How likely is it that such an occurrence will happen in the future? When an event is theoretically possible but has not occurred, what is the chance that it *will* occur? This question is central to the GMO dispute.

If we have enough understanding of the relevant biological mechanism, we might be able to derive from this a probability. However, it was clear in the GMO case that the science was not able to go this far. The only hard fact was that such an event had not happened, but theoretically could.⁸

This, alas, tells us very little. If a million plants have been grown in ten years without a harmful gene transfer, then the per-plant chance of this is probably small. But is it, say, one in ten billion, one in two million, or in between? The first suggests we don't need to worry, while the latter suggests we should, for the chance of a transfer in the next ten years is large. Alas, the mere absence of occurrence so far does not tell us the answer.

The current scientific position is therefore this: in many GMO contexts, we don't know if seriously harmful events will happen, or even how probable they are.

4 Although see Bohanes (2002: 349); Falke (2005: 356), both on the risk of non-compliance if democratic views are ignored.

5 Falke (2005).

6 Contra, Bohanes (2002: 350–357). However, in saying why democracy should trump science he suggests it is because it reflects socio-cultural values. That is not so far from the argument here. See also Howse (2000) on the complex relationship between the WTO and democracy.

7 Chalmers (2005: 663).

8 For details see Chalmers (2005).

The challenge is to cope with this absence of knowledge.⁹ That is not primarily a scientific matter.¹⁰ Science does not provide us with an answer to the GMO dispute.

5. The morality of taking risks

There is no simple unique way to deal with not knowing the risks of an act. However, there is inevitably a form of cost–benefit analysis – in a broad sense, more than merely economic¹¹ – involved.¹² Thus, both sides in the dispute could probably agree that the way to make a decision on GMOs is to balance possible gains against possible harm.

In this case, there may be some quantification possible, of profits to be made, or of lives saved through greater production, or of the possible cost or harm of things that might go wrong. However, not only is the possible quantification incomplete and uncertain, but it does not take us the whole way. Some forms of harm cannot be easily reduced to sums. How much extra production justifies a possible extinction?

The decision we arrive at depends on the value that we assign to various harms and benefits. This will vary to reflect different world views on several different levels. Firstly, there is the essence of the acts involved; a high value placed on individual freedom – to trade and produce – and on progress and on development and on material well-being leads to different conclusions than relatively higher values on collective support, stability, and conservation, and a view of material wealth as purely a means to an end.¹³ More importantly, views may differ on whether changing the nature of organisms is simply part of what mankind does, no different from traditional breeding, and an element of our discovery of our world and part of the management responsibility that our strength gives us, or an ugly intrusion into the natural order of things, an offence against nature and harmony.

While there are differences between populations on these questions, most populations do not occupy the extreme positions. The differences are of emphasis. This makes a second level of variation in views important – differing perceptions of the importance of context. What may be morally acceptable, for example, when done to save a life, or done by a public institution in the service of the collective good, may not be morally acceptable when done for profit, or for individual or

⁹ The precautionary principle is a way of answering this question. However, since it is often presented as ‘scientific’ when it is an embodiment of a broader and culturally specific policy choice, its use often brings more darkness than light. It also obscures the specificity of each situation.

¹⁰ See Scott (2000: 160). See also Nadine Scott (2005: 33).

¹¹ The term ‘cost–benefit analysis’ is often used by proponents and opponents in a way limiting it to quantifiable or concrete advantages and disadvantages. It is used above simply to mean that a balancing or weighing process is undertaken. As such, it can encompass for example precautionary or deliberative approaches, rather than being opposed to them. See further Kysar (2006).

¹² See Bohanes (2002: 368); Trachtman (1998: 40–58).

¹³ See Nadine Scott (2005: 23–24); Nelkin, Sands, and Stewart (2000: 527–528).

even purely national benefit.¹⁴ As well as the goals, there is also a question of trust here.¹⁵ Should private institutions be allowed to control and use certain powers, or do we feel that only publicly accountable ones have that right, as with the state monopoly on violence, and on most kinds of weapon? Perceptions reflect whole political and social philosophies, and in turn religious and metaphysical views. This leads to another level of variation, of temperament. Is the world a frightening place, to be treated with nervous respect, or a place to master? Is risk taking a sign of strength and courage which brings reward, or is it childish fecklessness? Are we optimists, or pessimists? These affect our final decision.

Insofar as governments may be taken to represent their people, it seems that Americans and Europeans do occupy different average positions on the scales of views that the above questions encompass. Nor does it seem implausible that Europeans are less inclined to think that scientific or economic advantage justifies risk.¹⁶

What is the best description of the character of these differences? It is suggested that it is morality. Views about religion and public ethics and individual and collective responsibilities are involved.¹⁷ We may compare decisions on GMOs with those on abortion, stem-cell research, or even the choosing of the sex or hair colour of a child. We are tampering with the essence of life, which is seen by some as an inherently morally laden act, even if, in some circumstances, justified.

The essentially moral character of views on GMOs is seen by comparison with other common dangers, such as those presented by cars or alcohol or nuclear power stations or eating dairy products. Even most Europeans would probably concede that the chances of concrete harm to them or their environment from these phenomena appear to be greater than those presented by GMOs. Yet the public reaction is different. It is not just the risk, or degree of risk, that is the issue in GMO debates but *the absence of sufficiently good reasons for taking the risk*.¹⁸ This is where the moral reasoning enters.¹⁹

Reliance on a public morals clause to restrict entry or production of GMOs therefore seems in principle appropriate. Differences are real and deeply felt. Comparison with the use of such clauses in the EU context indicates that less

14 Nadine Scott (2005: 39); Douglas and Wildavsky (1982).

15 Also the question of trust in science see Bohanes (2002: 354–363); Chalmers (2005).

16 Krenzler and McGregor (2000: 302–308); Christoforou (2004: 668); Chalmers (2005: 663).

17 See First Written Submission by the European Communities, Biotech Products, 17 May 2004, para 83; ‘beyond socio-economic considerations, some countries also take into account religious and ethical considerations’ (Chalmers, 2005: 651).

18 See Nadine Scott (2005: 39); Pildes and Sunstein (1997).

19 See Cranor (1997: 127); Howse (2000: 2351). This context specificity is also why morality may be a better location for these arguments than the right of states to determine their own ‘appropriate level of protection’ (See EC – *Measures Concerning Meat and Meat Products (Beef – Hormones)*, DS 26, DS 48; *Australia – Measure Affecting Importation of Salmon (Australia–Salmon)*, DS 18). Within this concept, it is harder to find room for varying levels of protection, especially when that variation depends partly on factors that are not themselves related to the risk. See Peel (2004: 82–86).

profound national differences are still respected by courts mindful of the fact that if trade or individual freedom always trump other values, there will be a backlash.²⁰ The question is therefore whether such morality exceptions exist within the WTO and whether the Europeans could have relied on them, or could in the future.

6. The WTO and morality exceptions

A complete overview of morality arguments and the WTO is beyond the scope of this paper. It will concentrate on two aspects: the ‘public morals’ exception in the GATT and implicitly in the TBT agreement; and the interpretation in the GMO interim Report of the Article 5.1 SPS requirement that SPS measures must be ‘based on’ a risk assessment.

Multi-purpose measures

A measure impacting on GMOs might imaginably fall within the GATT, the TBT agreement, or the SPS agreement, depending on its nature and formulation. For this reason, it is worth looking at the morality position under all three. An additional reason might be thought to lie in the finding in the GMO Report that a single measure can fall under more than one agreement, insofar as it serves multiple purposes – e.g. it may be SPS insofar as it protects health, and TBT insofar as it protects the consumer.²¹

This broad consideration may not always be necessary. If measures primarily protect moral sensibilities, then their purpose could be seen as unitary, so that they fall under the TBT alone.²² They would no longer be health measures.²³ However, a moral argument can be based on a number of factors, including health considerations. Insofar as measures represent a (moral) position on the right level of health protection, they arguably continue to fall under the SPS, and insofar as they represent a moral position on the kinds of goods that a decent society should allow to be sold for profit, they fall under the TBT. The outcome of moral arguments under each agreement is not necessarily the same.

Public morals in the GATT and the TBT agreement

The GATT provides in Article XX that public morals are a reason for derogation from its general provisions. The TBT provides in Article 2.2 that technical regulations must fulfill a legitimate objective and lists several acceptable ones, which do not include morality. However, the list is not exhaustive – it is preceded by ‘inter alia’ – and given the context of the TBT agreement as a self-expressed

20 Case 121/85 *Conegate* [1986] ECR 1007; Case 34/79 *Henn and Darby* [1979] ECR 3795; Case C-275/92 *Schindler* [1994] ECR I-1039; Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609. See also Ni Chaoimh (2006: 159–160).

21 Para. 7.166 of the Panel Report.

22 Para. 7.167.

23 Ibid.

development and continuation of the GATT it would be odd if reasons for restriction accepted as legitimate in the GATT context were then denied in the latter. It is suggested that morality is not often relevant to technical regulations, and hence not on the short list of major reasons, but that need not, and should not, be understood as meaning that if it was relevant, it could not be relied on. However, any such implicit clause would be, it seems likely, understood and interpreted in a way consistent with its analogue in the GATT. The question is therefore whether the sorts of arguments made above about GMOs fall within ‘public morals’.

The word ‘public’ is the source of difficulty here. ‘Public morals’ derogations are usually used to defend paternalistic regulations, which prevent individuals engaging in activities which may, in the eyes of their state or community, corrupt or degrade them. Prohibitions of pornography, gambling, and violent video games are typical examples.²⁴ However, such prohibitions also serve the morals of the public collectively. This is threatened by the presence of degraded individuals, but also by the carrying on of the immoral activity in the public sphere – sale of objects or services, or the performance of an activity, usually. The public whose morals need protection is comprised both of individuals tempted to engage in the act, and those around them who are exposed to it.

GMOs seem to raise a different kind of moral question. At first glance, it seems that the people committing immoral acts are not the consumers or citizens but the producers and sellers. Therefore, it seems not to be the protection of the morals of individuals or the community that is in issue here.

This argument can be rebutted. The fundamental objection in the GMO context is to an immoral public act – the immoral taking of an *unnecessary risk*. It may be argued that permitting the risk – the gambling with nature – that they entail is degrading of important values, and of society. It is then a much more ‘public’ morals issue than the often private vices referred to above. Individuals may not engage in degrading interactions with GMOs, but allowing the presence of GMOs in the public sphere nevertheless changes the moral position of society as a whole.

Moreover, producers and sellers, even if corporations, are also individuals with whose morals society is and should be concerned. Insofar as they are actors in the public sphere, the public have a similar, perhaps greater, interest in preventing them engaging in immoral acts than in preventing natural persons from doing so. Insofar as corporations consist of human beings, the restriction of their activities on moral grounds is no different from that of the restrictions imposed by law on citizens generally.

²⁴ Case 121/85 *Conegate* [1986] ECR 1007; Case 34/79 *Henn and Darby* [1979] ECR 3795; Case C-275/92 *Schindler* [1994] ECR I-1039; Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609; *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (US–Gambling), DS 285.

The Gambling Case

The only WTO case so far to address the meaning of 'public morals' is the *US–Gambling* case.²⁵ This concerned a number of US measures designed to prohibit primarily internet gambling via websites based in other jurisdictions. These were defended partly on the basis of the public morals derogation in Article XIV of the GATS, which the Appellate Body report found, unsurprisingly, should be interpreted similarly to the analogous derogation in Article XX of the GATT.²⁶

The Appellate Body endorsed the Panel's finding that the protection of public morals 'denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'.²⁷ It also agreed with the Panel that the US measures fell within this definition. The Panel had found that insofar as the measures aimed to prevent underage gambling and gambling addiction they were clearly within public morals, and insofar as they aimed to prevent fraud and money laundering they were arguably so. GATS also referred to public order, and these latter aims were clearly within that, and it was not necessary to decide which was the better heading.²⁸ It may be suggested that since the Panel found public morals and public order to be overlapping and related categories, the absence of any mention of public order in the GATT probably justifies a broader reading of 'public morals'. Public order will not have been omitted in order to narrow the exception range, but because it is not as obviously relevant to goods.

In any case, the decision provides reasonable support for bringing GMOs within morality. On the one hand, the situation in *US–Gambling* concerned a classic private vice. On the other, the concepts and definitions used by the Panel and Appellate Body were broader. The legitimation for prohibiting gambling as a morals measure was not just the protection of the souls of the gambling individuals, but the enforcement and maintenance of societal standards. The Panel, with its definition, endorses the idea that a state is entitled to prohibit activities that it finds inherently wrong.²⁹ In the GMO case, one could argue that the unnecessary manipulation of the nature of species is, like underage gambling, contrary to European societal views of right and wrong.

Necessity and proportionality

In *US–Gambling*, in accordance with GATT/WTO jurisprudence on policy exceptions in general, relying on a morals clause was found by both Panel and

²⁵ *US–Gambling*. For a more complete interpretation of the scope of 'public morals' in *US–Gambling* see Krajewski (2005: 438–445); Marwell (2006). See on the morals clause generally Feddersen (1998). Also Jarvis (2000) for an argument, not alien to the one here, that the public morals exception can do much more than it is currently used for.

²⁶ Although it noted that Article XIV also refers to public order, whereas Article XX does not.

²⁷ Para. 296 Appellate Body Report.

²⁸ Para. 6.469 Panel report. See Krajewski (2005: 439).

²⁹ See Broude (2005: 681–682). See Marwell (2006) and Feddersen (1998) for arguments on whether it is necessary that all states regard the issue as a moral question, or only the one relying on the exception. That is not to suggest that each state must have the same *standards*.

Appellate Body to have two elements; the measures must serve a purpose within the exception, and they must be necessary for this purpose. Here the Panel stated that necessity is satisfied when there is no other measure ‘reasonably available’ which would provide the Member State with its desired level of protection, with the concept of ‘reasonably available’ being determined by an objective weighing of the interests and values at stake, in the light, *inter alia*, of the effect on trade and the effectiveness of the measure.³⁰

In the GMO case, the necessity nexus is largely irrelevant. If the prohibition of GMOs is justified by protection of other species or public health, then there may indeed be necessity arguments – about the extent of the risk again. However, it is suggested in this paper that the immoral act is not the corruption of the environment – which even the Europeans must concede might never happen – but the taking of the unnecessary risk. Thus, it is the presence of GMOs in the public sphere that is itself contrary to public morals. Clearly, there is no way to prevent this other than by prohibiting them.

The greater problem for Europe is that its approach to GMOs is not a uniform one.³¹ Some GMOs are permitted, in certain contexts, for certain uses. When states attempt to rely on morals clauses, a common reason for their downfall is that the offending act or product, or a very similar one, is permitted in other circumstances. This makes it unconvincing that they have a genuine moral objection, and usually leads courts to conclude that they are merely attempting to disguise protectionism.³² European states therefore bear the burden of demonstrating why the risks created by the types and uses of GMOs that they permit are quantitatively or qualitatively different from the risks created by the ones that they do not. Why is this immoral and not that?

Certain distinctions will be possible. For example, there are clear differences between using GMOs as ingredients in processed foods – breakfast cereal for example – and importing them as whole organisms, for food or for planting. The former might raise human health risks, but there is no danger of the cornflakes spreading their genes to unmodified wheat crops. There are also different kinds of genes that are modified. Antibiotic or pesticide resistance might raise different issues than increased levels of a particular nutrient. It would not be inconsistent for a state to permit import of products made with GMOs provided that the genes are no longer intact or spreadable within the product, while refusing whole GMOs; the argument being that a possible influence on health is of a different moral nature than the risk of a spreading gene which changes the character of species irreversibly. Nor would it be inconsistent, if the science supported it, to permit organisms with certain kinds of modifications – say higher vitamins – on the grounds that no

30 See AB report paras. 304–311, especially 308.

31 On consistency and public morals, see Marwell (2006). See also Hurt (2006).

32 See, e.g., *US–Gambling*, supra *Henn and Darby*, supra.

harmful effect could be foreseen, while refusing those with modifications which if they spread out of context might be harmful.

These are sketched arguments. The purpose of the above paragraph is to demonstrate that in principle, in many contexts, there is room for nuance. However, it is for the obstructing state to demonstrate the consistency of its moral position in each case, and that there is no less restrictive way. This means that any morality argument against GMOs cannot be presented in isolation. It must be shown that the objection fits within a coherent and consistent pattern of behaviour and values.³³ Morality cards have to be played very precisely if they are to operate as trumps.

On the other hand, a morality argument can be quite broad. It is possible to argue against the importation of, for example, GMO-containing cornflakes because even though they present no risk to the European environment, the growing of the crops elsewhere entailed the taking of an immoral environmental risk, which does ultimately threaten Europe. The reality is that a variation in a species on one continent is likely to gradually spread, so one nation or continent has a legitimate interest in what is grown elsewhere. The environment and the global gene pool are to some extent collective goods. A nation with ethical objections to GMOs because of their environmental risk will be quite consistent if it then refuses to import the products that result from the taking of that risk elsewhere; indeed its morality argument would be much weaker and more hypocritical if it did not.

This is analogous to the on-going debate over the legitimacy of production standards for imports.³⁴ However, in some ways the argument is easier to make in the context of a morals clause. If the intention is to respect the essential feeling of states about what is right or wrong, then it is hardly consistent with this to require them to admit products made in a way which contravenes those feelings.

‘Based on’ risk assessment

The Panel did not find that a legitimate SPS measure must follow inevitably from a purely quantitative risk assessment. Indeed, it seemed to take pains to indicate that this was not the case. Firstly, the Panel took a fairly broad view of when a risk assessment should be made, of when there was sufficient scientific evidence for this.³⁵ It rejected many of the European arguments that such an assessment was impossible or unnecessary in the GMO context. Consistent with this approach, it then took a flexible view of what a risk assessment should be, emphasizing that it is not necessary to produce a quantitative assessment (although presumably that should be done where possible).³⁶ Even where there is not sufficient evidence to

33 This can be seen as a procedural approach. See Bohanes (2002: 365); Howse (2000: 2329); McGinnis and Movsesian (2000).

34 Which is outside the scope of this paper. See, e.g., Scott (2000) and references therein. Also Jarvis (2000).

35 Paras 7.3024–7.3027.

36 Para. 7.3027.

quantify, or fully quantify, risks, a qualitative risk assessment may be made, that is to say a statement of what the risks are, and perhaps some non-precise or comparative indication of their likelihood.³⁷

Thus, it seems that in substance the Panel is looking to see that decisions about SPS measures begin with as much science as possible, and as much serious examination of the risks as possible, but without a requirement that a high level of quantitative certainty or consensus be reachable. The risk assessment is almost a procedural requirement, demonstrating that the factual premises upon which decisions are based are as objective and depoliticized as possible.³⁸

More importantly, the Panel then went on to discuss the relationship between a risk assessment and the final decision. Once again, it was notably flexible. To justify a measure it is not at all necessary that the risk assessment conclude with a picture of inevitable doom, or even that it make any particular final decision inevitable. Rather it must be the case that there is a ‘rational relationship between a risk assessment and the SPS measure taken, or in other words, that the results of the risk assessment must “sufficiently warrant” or “reasonably support” the SPS measure at issue’.³⁹

This is spelling out that there is room for further argument between the risk assessment and the final decision. One must begin with its findings, and use these as a base from which to rationally proceed. Inevitably, in this consequent phase of policy development, factors other than those in the risk assessment will be used.⁴⁰ For example, if a risk assessment concludes that there is a real chance of a pesticide killing wild animals, a decision maker would take this as a starting point, but also consider the relative values that should be placed on wild animals and on increased production – for example – in coming to a conclusion. Decisions might be different in different countries. There is nothing in the GMO decision to suggest that such a manner of proceeding would be contrary to the SPS agreement. Rather it seems that the headline requirement is one of rationality.⁴¹ The aim of Article 5.1 SPS and the risk assessment requirement is to produce processes of decision making which have a transparent and somewhat standardized form, in order to make the objectivity and rationality of their content accessible to judicial assessment.⁴² Hence the separation of the risk assessment process from culturally specific considerations.⁴³ This is about making law out of politics.

37 In *Beef-Hormones* the Appellate Body suggests for risks to be the subject of a risk assessment they must be identifiable – they must have some concreteness. This is not the same as saying that they must be either quantifiable or substantial. See *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R at para. 186. For a contrary interpretation see Ni Chaoimh (2006: 151–153).

38 See note 33 above.

39 Para. 7.3028 Panel Report.

40 Christoforou (2004: 680–681).

41 Para. 7.3028.

42 See note 33 above; Howse (2000: 2335).

43 Paras 7.3242–7.3243.

The above interpretation is strengthened by the concession that risk assessments need not be quantitative.⁴⁴ A qualitative risk assessment is inherently open-ended, and, extreme situations apart,⁴⁵ does not entail any particular conclusion. Rather it sets out the possible scenarios and events that have to be taken account of.⁴⁶ Such a risk assessment does not provide the final answer, but begins the process of reasoning towards it.⁴⁷ It is data about how a given society believes those scenarios should be responded to that enables the reasoning process to be completed.

One danger is that risk assessments will be too narrow. The natural tendency of scientists may be to concentrate on what can be proved or disproved – which is little – in order to maximize their authoritativeness, and the natural tendency of those commissioning them may be to ask only for black-and-white answers. Rather, a responsible piece of scientific advice should identify what, *on the basis of current scientific knowledge, could happen* in the future, even if the chance of this cannot be quantified. This provides the political decision maker with a basis for rational choice.

7. Conclusion

In choosing to make their arguments scientific both sides in this case lost credibility. The argument that ‘it has not been proved to cause harm’ is childish and at odds with sensibly precautionary policy.⁴⁸ Many true things have not been proved; otherwise there would be no new research needed. On the other hand, the European attempt to present their fears as objectively rooted in science was misguided.⁴⁹ They had no hard results making theirs the only rational response. Rather they had a set of deeply culturally specific responses to uncertainty.

The decision shows that they could have been more honest. There is room for different values within all the agreements, provided that these values can be explained and communicated and fitted within a rational argument – as they can.

This suggestion may seem to undermine the trade agreements. There is certainly a less than clear line between the democracy argument, rejected above, and the morality arguments proposed. Why is ‘we don’t want to’ unacceptable, whereas ‘we don’t want to because we think it’s wrong’ is legitimate? The difference must

44 7.3027.

45 See para 7.3058.

46 See 7.3064.

47 Peel (2004: 61–68); Howse (1998: 2341).

48 Christoforou (2004: 637).

49 It may reflect a desire to mask political decisions in the language of technocracy, something perhaps a result of internal EU debates about legitimacy. Factors rooted in internal EU politics may thus feed through in a non-constructive way to its external relations. See Christoforou, 2004: 680–682 and 686–687).

lie in time and depth. The mood of the public is fickle and an aversion at a given moment cannot be the basis for law.⁵⁰ However, values which can be shown – by argument and evidence – to be genuine, rooted and consistent are different. We allow countries to prohibit pornography. It follows that we should allow them to prohibit the import and sale of GMOs. Nor do we have to be blind to nuance; allowing genetic modification under some circumstances does not necessarily undermine a moral objection to it under others, any more than permitting medical textbooks undermines the moral case for a prohibition of public nudity.

An important consideration is protectionism: a popular preference which has this effect looks more like opportunistic rejection of trade commitments than a genuine moral view.⁵¹ The more difficult consideration is temporal. Most reliance on morals clauses refers to a moral preference which predates the trade problem. Choices to prohibit alcohol, violent games, or pornography which are domestically long standing are more convincing in this context than those which appear to emerge contemporaneously with the offending products. Here GMOs have a problem, because as a genuinely new product there is no obvious historical or cultural preference to rely on. Finding their place in trade law involves contextualizing the ethical issues they raise.

In particular, although religion was not referred to in the decision and is not something that trade lawyers will rush to embrace as a factor in their advice to clients, some of the problems dealing with GMOs arise because they do not yet have a comfortable place in the conventional religious moralities. Prohibitions – alcohol and pornography again and weapons – which have a clear and traditional link with conventional interpretations of major religions are accepted.⁵² Whatever others may think of them, we all know that one cannot and should not try and force lands to embrace what their belief rejects, at least within limits. Had Abraham, Jesus, or Mohammed spoken about modifying plants, the law might have taken quite a different turn. Yet for many people, their views on genetic modification do derive directly or indirectly – via modern secular philosophies that have been influenced by religion – from the religious values that pervade societies, and as it becomes accepted that attitudes to GMOs, like attitudes to abortion or stem-cell research are partly the result of the sort of beliefs that courts do well not to tangle with, perhaps it will be easier to give resistance a rational place in the law. If a land can discover for itself what standpoint it is led to on GMOs by its pre-existing cultural and religious views, this will help legitimate and explain its position to others.

50 C.f. Howse (2000: 2343).

51 Assuming here that moral views on products are independent of their national origin. The alternative is imaginable, but raises very complex questions.

52 See Broude (2005).

It is important that accommodation of belief by adjudicators takes place. There is no single best way of facing the unknown, and WTO law is not intended to create one.⁵³ Then it would be more than trade law but the translation of a particular philosophy of life to the international arena, an unacceptably undemocratic and sneaky way of legislating for gung-ho liberalism.⁵⁴ This may have been its intention. It is certainly to some extent the product of a Victorian modernist belief in progress and industry, and there are no doubt many for whom removing obstacles to free exchange of goods and services, and removing superstitious obstacles to scientific progress are but two sides of the same rationalist coin. Yet the writers of the agreements, while they may have shared these sentiments, chose not to make them part of the law, and the WTO is open to those of diverse philosophies. It is provincialism – American, economic, or otherwise – to think that agreeing to free trade entails agreeing to admit GMOs.

At the same time, there are problems involved in engaging with the types of morality arguments outlined here. Many will be unhappy about giving an international trade panel jurisdiction over such questions, which may seem like an extension of its jurisdiction beyond what is legitimate. Should it be the Appellate Body that has the last word on whether a state can prohibit pornography, gambling, GMOs or weapons, or that determines the limits of acceptable environmental policy?⁵⁵

The problem is unavoidable. Trade has an impact on non-economic matters. Excluding these from international adjudication entails a greater loss of national control than the alternative, since then trade will take precedence without ado. Nor can one give states the last word on derogations without destroying any pretence to a binding agreement. The only alternative is for the adjudicator to look at the broader picture.

The key to rendering this legitimate is not to ask the trade court whether a moral view is right or wrong or sensible, but whether it is genuine and consistent. The emphasis must be on showing that the rule is in fact an authentic reflection of moral views within that jurisdiction. This is what states will find difficult, what Europe failed to do before the Panel, and what needs to be done in the future. A wide range of evidence needs to be mustered, from the sociological to the national-legal, to demonstrate that public morals is not simply a label being opportunistically attached to protectionism. Reasoning will have to be much tighter and more careful, and at the same time draw on a wider range of data, than governments appear to be used to. However, they have much to gain; the chance to preserve the values of their society.

⁵³ See Nadine Scott (2005: 24).

⁵⁴ *Ibid.* Her paper discusses how these normative arguments about risk and political philosophy nevertheless enter the WTO by the backdoor via rhetoric.

⁵⁵ See Trachtman (1998).

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